

BEFORE THE

# Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing	)	CG Docket No. 02-278
The Telephone Consumer Protection Act	)	
Of 1991	)	

To: The Commission

## **REPLY COMMENTS OF CBS CORPORATION**

CBS Corporation (“CBS”)<sup>1</sup> hereby submits these Reply Comments in response to the Public Notice issued by the Federal Communications Commission (the “Commission”) on November 22, 2005 regarding the Petition for Declaratory Ruling (the “Petition”) filed by The Fax Ban Coalition (the “Coalition”). The Petition asks the Commission to affirm that it has the exclusive authority to regulate interstate commercial fax messages and that Section 17538.43 of the California Business and Professions Code (the “California Fax Law”) and other state laws that purport to regulate interstate facsimile transmissions are preempted by the federal Telephone Consumer Protection Act of 1991 (the “TCPA”). CBS strongly supports the Coalition’s position and joins the dozens of Commenters who request that the Commission promptly issue such a

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<sup>1</sup> CBS is a worldwide media company with operations in broadcast television and radio, cable television, television programming production and syndication, outdoor advertising, publishing, theme parks and digital media.

Declaratory Ruling. Those Commenters include Bank of America, the National Association of Realtors and the National Federation of Small Businesses.

CBS and its subsidiaries routinely rely upon facsimile transmissions to maintain contact with consumers, advertisers, vendors, and other parties with which CBS has existing relationships, both nationally and globally. By way of example, with respect to CBS's broadcasting subsidiaries, many CBS television and radio broadcast stations are located in markets that cross state boundaries. Thus, stations in New York City communicate via facsimile with parties not only in New York state, but in New Jersey and Connecticut. Stations in Washington, D.C. distribute facsimiles in the District of Columbia, Virginia and Maryland, while stations in Philadelphia do so in Pennsylvania and New Jersey. Also, stations communicate with agencies, advertisers, program producers, artists, performers and others who may not be located in the multiple-state market where that station operates. The same is true for CBS's other businesses, including cable programming, television production, publishing, outdoor advertising and entertainment parks. As a result, the California Fax Law, and similar state laws that purport to regulate interstate facsimile transmissions, impose significant and unnecessary burdens on companies, requiring compliance with myriad, and often conflicting, requirements. Moreover, such state laws are unnecessary as the privacy interests of individuals with regard to interstate facsimile transmissions in each of these states are already protected from receiving inappropriate faxes under the federal TCPA.

Thus, state laws such as the California Fax Law stand to create a confusing and conflicting patchwork of federal and state rules that must be followed by businesses seeking to legitimately serve the interests of their customers. However, in part to preclude just such a result, the TCPA provides that states do not have the authority to regulate interstate

communications, including faxes sent between states. The Commission has repeatedly recognized this limitation on state power, noting that exclusive federal regulation of interstate commercial faxes is consistent both with Congressional intent and the TCPA.

## I.

### **The Federal Government Has Exclusive Jurisdiction Over Interstate Communications.**

As the Coalition and numerous Commenters correctly note, the Communications Act of 1934 grants the Commission jurisdiction over “all interstate and foreign communication”<sup>2</sup> with “interstate communications ... totally entrusted to the FCC.”<sup>3</sup> Through this grant of exclusive jurisdiction, “Congress set up a dual regulatory regime for communications services”<sup>4</sup> such that its jurisdiction over interstate and foreign communications precludes state regulation.

Congress enacted the TCPA because it recognized that “States do not have jurisdiction over interstate calls”<sup>5</sup> and thus they “do not have the jurisdiction to protect their citizens against those who ... place interstate telephone calls.”<sup>6</sup> Indeed Congress has noted that although more than 40 states had enacted legislation regulating unsolicited calls and faxes, “many States” had explicitly requested “Federal legislation to regulate interstate telemarketing calls to supplement their restrictions on intrastate calls.”<sup>7</sup> Such requests reflect recognition by those states that they

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<sup>2</sup> 47 U.S.C. § 152.

<sup>3</sup> *NARUC v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984).

<sup>4</sup> *Vonage Holdings Corporation*, 19 FCC Rcd 22404, 22412 (2004).

<sup>5</sup> S. Rep. 102-178, 3 (1991).

<sup>6</sup> *Id.* at 5.

<sup>7</sup> *Id.* at 3.

do not have the ability to regulate such interstate communications; thus, the provisions of the California Fax Law and similar state laws purporting to regulate interstate faxes are invalid.

Under the Supremacy Clause, states may not regulate an area of interstate commerce for which Congress has intended exclusive federal regulation.<sup>8</sup> Accordingly, any attempt by a state to regulate interstate communications, the jurisdiction for which has been exclusively reserved to the federal government, is preempted and void. The Commission should therefore declare, as requested by the Coalition, that to the extent the California Fax Law purports to regulate interstate facsimile transmissions, it, and other similar state laws, are invalid.

## II.

### **The Commission Has Repeatedly Recognized That Exclusive Federal Regulation Of Interstate Commercial Facsimile Transmissions Is Consistent With Congressional Intent And The TCPA.**

The Commission has noted that the TCPA was enacted to address privacy concerns while providing uniform rules in this arena pursuant to which businesses and organizations may operate. In issuing regulations implementing the TCPA, the Commission recognized that as “States traditionally have had jurisdiction over only intrastate calls ... Congress enacted [the TCPA] to give the Commission jurisdiction over [interstate] calls.”<sup>9</sup> Indeed, Congress included a finding in the TCPA itself that “over half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operations.”<sup>10</sup>

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<sup>8</sup> *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 368 (1986).

<sup>9</sup> *Id.*

<sup>10</sup> Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, §2, 105 Stat. 2394.

The Coalition has noted several other instances in which the Commission clearly stated that regulation of interstate communications is exclusively within the province of the federal government. In particular, it notes the following specific exhortations of exclusive FCC jurisdiction in analogous circumstances:

“The States do not have jurisdiction over interstate communications.”<sup>11</sup>

“The Commission’s jurisdiction over interstate and foreign communications is exclusive of State authority.”<sup>12</sup>

“In the absence of a specific statutory provision regarding jurisdiction ... Congress has given the Commission exclusive jurisdiction over ‘all interstate and foreign communication’ and ‘all persons engaged ... in such communication.’”<sup>13</sup>

Consistent with such prior pronouncements, the Commission should grant the Coalition’s request for a Declaratory Ruling confirming that the FCC has exclusive jurisdiction over interstate facsimile transmissions and that to the extent it purports to regulate interstate facsimile transmissions, the California Fax Law, and other similar state laws, are invalid.

### III.

#### **Failure To Preempt State Regulation Of Interstate Facsimile Transmissions Creates A Confusing And Conflicting Patchwork Of Laws In Direct Conflict With Congressional Intent.**

In promulgating rules to implement the TCPA, the Commission noted that “it was the clear intent of Congress generally to promote a uniform regulatory scheme under which telemarketers would not be subject to multiple, conflicting regulations”<sup>14</sup> and concluded that “inconsistent interstate rules frustrate the federal objective of creating uniform national rules, to

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<sup>11</sup> *AT&T Co., Mem. Op. & Order*, 56 FCC 2d 14, 20 (1975).

<sup>12</sup> *Operator Services Providers of America Petition for Expedited Declaratory Ruling, Mem. Op. & Order*, 6 FCC Rcd 4475, 4476 (1991).

<sup>13</sup> *Vonage Holdings Corp., Mem. Op. & Order*, 19 FCC Rcd 22404, 22412 (2004).

<sup>14</sup> TCPA Order at 14064.

avoid burdensome compliance costs for telemarketers and potential consumer confusion.”<sup>15</sup> The Commission’s own record generated in promulgating rules under the TCPA “supports the finding that application of inconsistent rules for those that telemarket on a nationwide or multi-state basis creates a substantial compliance burden for those entities.”<sup>16</sup>

Entities such as CBS, which seek to legitimately do business in multiple states – indeed, globally – currently find themselves subject to exactly such a tangled web of conflicting state and federal regulations affecting interstate communications. Despite a federal law that seeks to balance the privacy interests of consumers while furthering legitimate business interests, more than 30 states have enacted laws that purport to regulate interstate facsimile transmissions with a variety of contradictory requirements. By way of example:

- California, Michigan, Oregon, Pennsylvania and seven other states with laws regulating interstate faxes do not include an “established business relationship” exemption permitting the transmission of unsolicited advertisements by facsimile, while Georgia, Massachusetts, New York, Texas and fifteen other states do recognize such an exemption.
- Minnesota, New Mexico, Pennsylvania and Rhode Island require faxes to specify a toll-free opt-out telephone number, while in Washington opt-outs may not be made by telephone.
- Kentucky, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Texas and Wisconsin all specify time periods each day during which faxes may be sent, with such time periods often in conflict.

Allowing the various states to enact such conflicting laws governing interstate communications frustrates Congress’ intent to create a “uniform regulatory scheme” – the principal object of the TCPA. These state laws impose significant burdens on legitimate business enterprises that seek to comply with all relevant laws and conduct their operations in a

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

manner which respects the legitimate privacy concerns of those with whom they seek to communicate via facsimile.

#### **IV.**

##### **Conclusion.**

For the foregoing reasons, CBS respectfully requests that the Commission issue the Declaratory Ruling requested by the Coalition, affirming that the Commission has exclusive authority to regulate interstate, commercial facsimile transmissions and that Section 17538.43 of the California Business and Professions Code, and other state laws that purport to regulate interstate facsimile messages, are preempted by the federal Telephone Consumer Protection Act of 1991.

Respectfully submitted,

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